

Title	Revision of Appellate Rules: Third Installment, Part Two (repeal Cal. Rules of Court, rules 39.50–39.57; adopt revised rules 34, 34.1, 34.2, 35, 35.1, 35.2, 35.3, 36, 36.3; amend rules 36.1 and 36.2).
Summary	The proposed revision of rules 39.50–39.57 of the California Rules of Court, which govern appeals in death penalty cases, is intended to clarify their meaning and facilitate their use by practitioners, parties, and court personnel.
Source	Appellate Advisory Committee Justice Joyce L. Kennard, Chair
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Discussion	<p>Under the direction of the Appellate Advisory Committee, the Appellate Rules Project Task Force—consisting of appellate practitioners, judicial staff attorneys, the Reporter of Decisions, and an associate justice of the Supreme Court—is revising the appellate rules of the California Rules of Court in installments. The first installment (revised rules 1–18) was adopted by the Judicial Council and took effect on January 1, 2002. The second installment (revised rules 19–29.9; new rules 36.1, 36.2, and 47.1; amended rules 5, 13, and 40) was adopted by the Judicial Council and took effect on January 1, 2003. The first part of the third installment (revised rules 30–33.3) has been the subject of public comment but has not yet been adopted.</p> <p>The Appellate Advisory Committee now invites public comment on the second part of the third installment, attached to this report. It consists of revised and amended rules 34–36.3 and deals with appeals in death penalty cases.</p> <p><i>The proposed death penalty rules are self-contained.</i></p> <p>Existing rule 39.50 provides that the rules governing noncapital criminal appeals govern appeals from judgments of death, “except where otherwise provided by these rules, 39.50 through 39.57.” This rule structure is cumbersome to use and can result in uncertainty as to whether a particular noncapital appeal rule does or does not apply in a</p>

death penalty appeal. To clarify precisely which rules do apply in death penalty appeals—and with the support of practitioners in such cases—the committee proposes to make the death penalty rules self-contained. Rather than seeking to infer which noncapital appeal rules might apply to death penalty appeals, under the proposed revision courts and practitioners will simply consult the death penalty rules directly. This structure will facilitate the use of these rules, because appeals in the two types of criminal cases—noncapital and capital—are in large part handled by different practitioners and heard by different courts. To avoid undue repetition of provisions that apply to both kinds of cases, several of the proposed death penalty rules expressly cross-refer to corresponding criminal rules. Please note, however, that the latter rules are currently being revised in response to public comment; in the form in which they were circulated for comment, they may be viewed at the following Web site:

www.courtinfo.ca.gov/invitationstocomment/documents/sp02-07.pdf

Contents of this portion of the rules revision

Proposed rules 34, 34.1, 34.2, 35, 35.1, 35.2, 35.3, 36, and 36.3 restate in revised form existing rules 39.50–39.57. The proposed amendments to the titles of existing rules 36.1 and 36.2 delete words that will be superfluous in the new self-contained structure of the death penalty rules.

Because the majority of the existing death penalty rules were adopted as recently as 1997, the committee found it necessary to make few substantive changes. Those changes are identified in the committee comments accompanying the rules. In addition, a number of gaps were filled and ambiguities clarified, and all the rules were recast in the style and format of the rules revision project.

Word count and line spacing

Proposed rule 36(b) states the maximum permissible length of a brief produced on a computer in terms of word count rather than page count. This substantive change tracks an identical provision in rule 14(c) governing Court of Appeal briefs. (See also rules 28.1(e) [petition for review, answer, and reply] and 29.1(c) [Supreme Court briefs on the merits].) Rule 14(c)(1), which took effect on January 1, 2002, derived the word-count procedure from Federal Rules of Appellate Procedure, rule 32(a)(7). To convert the page-count limits of the former rules into the word-count limits of the revised rules, rule 14(c) and its companion rules use a standard ratio of 280 words per page; this is the

average number of words on a computer-produced 8-1/2 x 11-inch page with double-spaced lines of text.

The committee recognizes that rule 14(b)(5) also permits lines of text in a brief to be one-and-a-half spaced, and that the adoption of the word-count procedure thus had the incidental effect of reducing by approximately 18 percent the maximum permissible length of a computer-produced brief whose text is one-and-a-half spaced. Two considerations, however, mitigate any adverse impact of this change: first, in actual practice very few computer-produced briefs are prepared in one-and-a-half spaced text; second, the rules provide that any party with good cause to file a one-and-a-half spaced brief exceeding the prescribed word count may apply to the Chief Justice or presiding justice for permission to do so. For these reasons, the committee is of the view that the benefits of the word-count procedure to courts and practitioners outweigh any incidental effect that the procedure may have on the use of one-and-a-half spaced briefs.

The committee invites comment on whether rule 14(b)(5) should be amended to conform to its federal counterpart by providing that the text of all briefs must be double-spaced (Fed. Rules App.Proc., rule 32 (a)(4)).

Overall goals of the Appellate Rules Project

The project's main goals are to clarify the meaning of the rules and to facilitate their use by practitioners, parties, and court personnel by:

- Simplifying wording;
- Resolving ambiguities;
- Eliminating redundant and obsolete provisions;
- Conforming older rules to current practice;
- Removing inconsistencies in style and terminology;
- Restructuring individual rules into subdivisions to promote readability and understanding;
- Rearranging the sequence of subdivisions and rules as logic dictates;
- Making substantive changes when necessary to fill gaps in rule coverage, to conform to current practice, or to improve the appellate process;
- Identifying substantive and structural changes to the rules through explanatory Advisory Committee Comments (which will be published with the rules); and
- Recommending format and style guidelines.

Advisory Committee Comments

Because of the extensive revisions and restructuring of these proposed rules, specific changes are *not* indicated by the usual underscoring and ~~striketrough~~ of the text. Instead, please refer to the proposed ***Advisory Committee Comment*** that follows each rule, which explains the source of its provisions and any substantive change in the rule.

Although most of the proposed revisions are either stylistic or structural, any substantive changes are identified and explained in the comments. If a change is not specifically discussed, it should be presumed that the change is not intended to be substantive. The Advisory Committee Comments are proposed for adoption by the council as official interpretive history, and for inclusion in all published versions of the revised rules. Because the Advisory Committee Comments contemplate adoption of the revised rules, the comments refer to the current rules as “former” rules and to the proposed rules as “revised” rules.

Attachments

Rules 39.50–39.57 of the California Rules of Court would be repealed; revised rules 34, 34.1, 34.2, 35, 35.1, 35.2, 35.3, 36, and 36.3 would be adopted; and rules 36.1 and 36.2 would be amended, effective January 1, 2004, to read:

Part VII. Death Penalty Appeals

Rule 34. In general

(a) Automatic appeal to Supreme Court

If a judgment imposes a sentence of death, an appeal by the defendant is automatically taken to the Supreme Court.

(b) Copies of judgment

When a judgment of death is rendered, the superior court clerk must immediately send certified copies of the commitment to the Supreme Court, the Attorney General, the Governor, and the California Appellate Project in San Francisco.

(c) Extensions of time

When a rule in this part authorizes a trial court to grant an extension of a specified time period, the court must consider the relevant policies and factors stated in rule 45.5.

(d) Supervising preparation of record

The Supreme Court clerk, under the supervision of the Chief Justice, must take all appropriate steps to insure that superior court clerks and reporters promptly perform their duties under the rules in this part. This provision does not affect the superior courts' responsibility for the prompt preparation of appellate records in capital cases.

(e) Definitions

For purposes of this part:

- (1) The delivery date of a transcript sent by mail is the mailing date plus five days.

(2) “Trial counsel” means both the defendant’s trial counsel and the prosecuting attorney

Advisory Committee Comment

Revised rule 34 restates former rule 39.50 and related provisions of the Penal Code.

Subdivision (a). Subdivision (a) is derived from Penal Code section 1239, subdivision (b).

Subdivision (b). Subdivision (b) is derived from Penal Code sections 1217 and 1218 and former rule 39.50(e).

Subdivision (c). In determining whether to grant an extension of time under these rules, former rule 39.50(d) made it permissible for a trial court to consider the factors listed in rule 45.5. But rule 45.5 makes mandatory for the Supreme Court and the Court of Appeal to consider those same factors (rule 45.5(c)), and no reason appears for a different rule in the case of the trial courts. Moreover, the list of such factors in rule 45.5 is so comprehensive that it is difficult to conceive of a factor that a trial court could properly consider that is not found in that rule. (See, e.g., rule 45.5(c)(9) [“Any other factor which in the context of a particular case constitutes good cause”].) In a substantive change, revised subdivision (c) therefore provides that in determining whether to grant an extension, a trial court *must* consider the factors stated in rule 45.5. One of those factors is particularly applicable to appeals from judgments of death, i.e., “[t]he number and complexity of the issues raised . . . and the length of the record, . . . including the number of relevant trial exhibits.” (Rule 45.5(c)(3).) (The “average-length record” described in the second sentence of subdivision (c)(3) refers to records in civil and noncapital criminal cases.)

Subdivision (d). Revised subdivision (d) is former rule 35(h).

Subdivision (e). Revised subdivision (e)(2) restates Penal Code section 190.8, subdivision (i).

Former subdivision (b). Subdivision (b) of former rule 39.50, which provided that the rules in this Part must be “interpreted to effectuate the intent of the Legislature, as stated in Penal Code section 190.8 . . .” is deleted as unnecessary: any rule of court that implements a statute must be construed to effectuate the intent of that statute.

Rule 34.1. Contents and form of the record

(a) Contents of the record

(1) The record must include a clerk's transcript containing:

(A) all items listed in rule 31(b), except item (10);

(B) all items listed in rule 31.1(b)(1), whether or not requested;

(C) any other document filed or lodged in the case, including each juror questionnaire, whether or not the juror was selected; and

1
2 (D) as part of the master index, an index of all sealed documents and all
3 sealed reporter's transcripts with the date and the name of the parties
4 present, but the index must not disclose the substance of the sealed
5 matter.
6

7 (2) The record must include a reporter's transcript containing:
8

9 (A) all items listed in rule 31(c);
10

11 (B) all items listed in rule 31.1(b)(2), whether or not requested; and
12

13 (C) any other oral proceedings in the case, including any proceedings that
14 did not result in a verdict or sentence of death because the court
15 ordered a mistrial or a new trial.
16

17 (3) The superior court or the Supreme Court may order the record to include
18 additional material.
19

20 **(b) Confidential records**
21

22 (1) All documents filed confidentially under Penal Code sections 987.9 or
23 987.2 must be sealed. Documents filed under Penal Code section 987.9
24 must be bound separately from documents filed under Penal Code section
25 987.2. Unless otherwise ordered, copies may be provided only to the
26 Supreme Court and to counsel for the defendant to whom the documents
27 relate.
28

29 (2) All reporter's transcripts of in camera proceedings must be sealed. Unless
30 otherwise ordered, copies may be provided only to the Supreme Court
31 and to counsel for parties present at the proceedings.
32

33 (3) Records sealed under this rule must comply with rule 31.2.
34

35 **(c) Juror-identifying information**
36

37 Any document in the record containing juror-identifying information must be
38 edited in compliance with rule 31.3. Unedited copies of all such documents
39 and a copy of the table required by the rule, under seal and bound together,
40 must be included in the record sent to the Supreme Court.
41

42 **(d) Form of record**
43

1 The clerk's transcript and the reporter's transcript must comply with rule 9.
2

3 **Advisory Committee Comment**

4 **Subdivision (a).** Subdivision (a) of revised rule 34.1 restates Penal Code section 190.7,
5 subdivision (a), and former rule 39.51(a) and (c). Revised subdivision (a)(1)(D) fills a gap by requiring
6 the clerk's transcript to include, as part of its master index, an index of all documents and reporter's
7 transcripts filed in sealed form under subdivision (b). The purpose of this substantive change is to assist
8 the parties in making—and the court in adjudicating—motions to unseal portions of the record. To
9 protect confidentiality until a record is unsealed, however, the index must endeavor to identify the sealed
10 matter without disclosing its substance.
11

12 **Subdivision (b).** Under the third sentence of revised rule 34.1(b)(1), copies of sealed documents
13 may be given only to the Supreme Court and to the defendant concerned “[u]nless otherwise ordered.”
14 The qualification is added in recognition of the statutory right of the Attorney General to request, under
15 certain circumstances, copies of documents filed confidentially under Penal Code section 987.9 (see *id.*,
16 subd. (d)). To facilitate compliance with such requests, the second sentence of revised rule 34.1(b)(1)
17 requires such documents to be bound separately from documents filed confidentially under Penal Code
18 section 987.2.
19

20 Paragraph (3) of revised subdivision (b) implements the purpose of the subdivision by requiring
21 compliance with revised rule 31.2 in capital cases.
22

23 **Subdivision (c).** The first sentence of revised rule 34.1(c) fills a gap by requiring compliance
24 with revised rule 31.3 in capital cases, i.e., by requiring the editing of all documents in the record to delete
25 any juror-identifying information. The second sentence restates paragraph (3) of former rule 33.6.
26

27 **Subdivision (d).** Revised subdivision (d) moves to a more appropriate location provisions of
28 former rule 39.53(b)(1) and (3) requiring that the clerk's and the reporter's transcripts comply as to form
29 with rule 9.
30
31

32 **Rule 34.2.Preparing and certifying the pretrial record**

33 **(a) Definitions**

34 For purposes of this rule:
35
36

- 37
- 38 (1) “the pretrial proceedings” are all proceedings of any kind held in the case
39 before trial, whether in open court or otherwise, and include the
40 preliminary hearing or grand jury proceeding;
41
 - 42 (2) “the pretrial record” is the court file of the pretrial proceedings and the
43 reporter’s transcript of the oral pretrial proceedings;
44

1 (3) “the responsible judge” is the judge assigned to try the case or, if none is
2 assigned, the presiding superior court judge or designee of the presiding
3 judge; and
4

5 (4) “the designated judge” is the judge designated by the presiding judge to
6 supervise preparation of the pretrial record.
7

8 **(b) Notice of intent to seek death penalty**
9

10 In any case in which the death penalty may be imposed:
11

12 (1) If the prosecution notifies the responsible judge that it intends to seek the
13 death penalty, the judge must notify the presiding judge and the clerk.
14 The clerk must promptly enter the information in the record.
15

16 (2) If the prosecution does not give notice under (1)—and does not give
17 notice to the contrary—the clerk must notify the responsible judge 60
18 days before the first date set for trial that the prosecution is presumed to
19 seek the death penalty. The judge must notify the presiding judge, and
20 the clerk must promptly enter the information in the record.
21

22 **(c) Assignment of judge designated to supervise pretrial record preparation**
23

24 (1) Within five days after receiving notice under (b), the presiding judge must
25 designate a judge to supervise preparation of the pretrial record.
26

27 (2) If a preliminary hearing was held in the case, the designated judge must
28 be the judge who presided at that hearing.
29

30 **(d) Notice to prepare transcript**
31

32 Within five days after receiving notice under (b)(1) or notifying the judge
33 under (b)(2), the clerk must notify each reporter who reported a pretrial
34 proceeding to prepare a transcript of the proceeding. If there is more than one
35 reporter, the designated judge may assign a reporter or other designee to
36 perform the functions of the primary reporter.
37

38 **(e) Reporter’s duties**
39

40 (1) The reporter must prepare an original and five copies of the reporter’s
41 transcript and two additional copies for each codefendant against whom
42 the prosecution is seeking the death penalty. The transcript must include
43 the preliminary hearing or grand jury proceeding unless a transcript of

1 that hearing or proceeding has already been filed in superior court for
2 inclusion in the clerk's transcript.

3
4 (2) The reporter must certify the original and all copies of the reporter's
5 transcript as correct.

6
7 (3) Within 20 days after receiving the notice to prepare the reporter's
8 transcript, the reporter must deliver the original and all copies of the
9 transcript to the clerk.

10
11 **(f) Review by counsel**

12
13 (1) Within five days after the reporter delivers the transcript, the clerk must
14 deliver the original to the designated judge and one copy to each trial
15 counsel. If a different attorney represented the defendant in pretrial
16 proceedings, both attorneys must perform the tasks required by (2).

17
18 (2) Each trial counsel must promptly:

19
20 (A) review the reporter's transcript for errors or omissions;

21
22 (B) review the docket sheets and minute orders to determine if all
23 pretrial proceedings have been transcribed;

24
25 (C) consult with opposing counsel to determine if any other proceedings
26 or discussions should have been transcribed; and

27
28 (D) review the court file to determine if it is complete.

29
30 **(g) Declaration and request for corrections or additions**

31
32 (1) Within 30 days after the clerk delivers the transcript, each trial counsel
33 must serve and file a declaration stating that counsel or another person
34 under counsel's supervision has performed the tasks required by (f), and
35 either:

36
37 (A) a request for corrections or additions to the reporter's transcript or
38 court file; or

39
40 (B) a statement that counsel does not request any corrections or
41 additions.

- (2) If a different attorney represented the defendant in pretrial proceedings, that attorney must also file the declaration required by (1).
- (3) A request for additions to the reporter's transcript must state the nature and date of the proceedings and identify the reporter who transcribed them.
- (4) If any counsel fails to timely file a declaration under (1), the designated judge must not certify the record and must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

(h) Corrections or additions to the pretrial record

If any counsel files a request for corrections or additions:

- (1) Within 15 days after the last request is filed, the designated judge must hold a hearing and order any necessary corrections or additions.
- (2) If any portion of the proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule 32.3.
- (3) Within 20 days after the hearing under (1), the original reporter's transcript and court file must be corrected or augmented to reflect all corrections or additions ordered. The clerk must promptly send copies of the corrected or additional pages to the parties.
- (4) The judge may order any further proceedings to correct or complete the pretrial record.
- (5) When the judge is satisfied that all corrections and additions ordered have been made and copies of all corrected or additional pages have been sent to the parties, the judge must certify the pretrial record as correct and complete.
- (6) The pretrial record must be certified as correct and complete within 120 days after the presiding judge orders preparation of the record.

(i) Computer-readable copies

- (1) When the pretrial record is certified as correct and complete, the clerk must promptly notify the reporter to prepare six computer-readable copies

1 of the transcript and an additional computer-readable copy for each
2 codefendant sentenced to death.

- 3
- 4 (2) Each computer-readable copy must comply with the format, labeling,
5 content, and numbering requirements of Code of Civil Procedure section
6 271, subdivision (b), and any additional requirements prescribed by the
7 Supreme Court, and must be further labeled to show the date it was made.
8
- 9 (3) A computer-readable copy of a sealed transcript must be placed on a
10 separate disk and clearly labeled as confidential.
- 11
- 12 (4) The reporter is to be compensated for computer-readable copies as
13 provided in Government Code section 69954, subdivision (b).
14
- 15 (5) Within 20 days after the clerk notifies the reporter under (1), the reporter
16 must deliver the computer-readable copies to the clerk.
17

18 **(j) Delivery to superior court**

19

20 Within five days after the reporter delivers the computer-readable copies, the
21 clerk must deliver to the responsible judge, for inclusion in the superior court
22 record:
23

- 24 (1) the certified original reporter's transcript of the pretrial proceedings and
25 the copies that have not been distributed to counsel, including the
26 computer-readable copies; and
27
- 28 (2) the complete court file of the pretrial proceedings or a certified copy of
29 that file.
30

31 **(k) Extension of time**

- 32
- 33 (1) Except as provided in (2), the designated judge may extend for good
34 cause any of the periods specified in this rule.
35
- 36 (2) The period specified in (h)(6) may be extended only as follows:
37
- 38 (A) the designated judge may request an extension of the period by
39 presenting a declaration to the responsible judge explaining why the
40 time limit cannot be met; and
41
- 42 (B) the responsible judge may order an extension not exceeding 90
43 additional days; in an exceptional case the judge may order an

1 extension exceeding 90 days, but must state on the record the
2 specific reasons for the greater extension.
3

4 **(I) Notice that death penalty is no longer sought**
5

6 If at any time the death penalty is no longer sought after the presiding judge
7 has ordered preparation of the pretrial record, the clerk must promptly notify
8 the reporter that this rule does not apply.
9

10 **Advisory Committee Comment**

11 Revised rule 34.2 is former rule 39.52, and implements Penal Code section 190.9(a). Revised
12 rules 34.2 to 35.2 govern the process of preparing, certifying, and sending the record in any appeal from a
13 judgment of death imposed after a trial that began on or after January 1, 1997. Specifically, revised rule
14 34.2 provides for the pretrial record in such an appeal. Revised rule 35.3 governs the process of
15 certifying the record in any appeal from a judgment of death imposed after a trial that began before
16 January 1, 1997.
17

18 **Subdivision (a).** Revised rule 34.2(a)(1) fills a gap by including grand jury proceedings among
19 the pretrial proceedings it defines. Although in limited use for the purpose, grand jury proceedings may
20 also result in judgments of death.
21

22 Former rule 39.52(b)(1) used the phrase “responsible superior court judge” to refer to the judge
23 assigned to try the case. Because all trial judges are superior court judges after court consolidation,
24 revised rule 34.2(a)(3) deletes the qualifier “superior court” as unnecessary.
25

26 **Subdivision (b).** Former rule 39.52(b) directed the judge to “enter . . . on the record” the fact that
27 the prosecution has given notice of intent to seek the death penalty. Recognizing that it is normally the
28 clerk rather than the judge who makes docket entries, revised rule 34.2(b)(1) instead directs the judge to
29 notify the clerk of the prosecution’s notice and directs the clerk to enter that fact on the record. Similarly,
30 revised rule 34.2(b)(2) clarifies the operation of the presumption of prosecution intent declared by former
31 rule 39.52(b)(2).
32

33 **Subdivision (f).** As used in revised rule 34.2(f)—as in all rules in this part—trial counsel “means
34 both the defendant’s trial counsel and the prosecuting attorney.” (Revised rule 34(e)(2).)
35

36 **Subdivision (g).** Revised rule 34.2(g)(1), like former rule 39.52(h), requires counsel to file a
37 declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record
38 for completeness and accuracy. But under the former rule, counsel who was satisfied with the state of the
39 record—and therefore had determined not to request any corrections or additions—simply remained silent
40 as to any such request, and the court was required to infer from that silence that counsel did not intend to
41 make the request. In a substantive change designed to avoid any misunderstanding of counsel’s intent on
42 this important point, revised rule 34.2(g)(1)(B) requires counsel, as part of the required declaration, to
43 express any intent not to request corrections or additions.
44

45 Revised rule 34.2(g)(3) fills a gap; it is derived from former rule 39.55(b).
46

1 Former rule 39.52(i) declared that if any counsel failed to file either the declaration required by
2 the rule or a request for extension of time, the court was directed to “use all reasonable means to ensure
3 compliance with this rule.” Although revised rule 34.2(g)(4) deletes the quoted language because it
4 duplicates the governing statute (Pen. Code., § 190.8, subd. (a)), the directive remains in force by
5 operation of the statute; for the purposes of the rule, however, it is sufficient to specify—as did the former
6 rule—that in such event the court must set the matter for hearing, require a showing of good cause why
7 counsel has not complied, and fix a date for compliance.
8

9 **Subdivision (h).** Revised rule 34.2(h)(2) fills a gap and reflects current practice. Revised rule
10 34.2(h)(6) restates a provision of Penal Code section 190.9, subdivision (a)(2).
11

12 **Subdivision (i).** Former rule 39.52(i)(6) required computer-readable copies of the transcript to
13 comply with former Code of Civil Procedure section 269, subdivision (c), and former rule 35(b), and the
14 latter rule specified that such copies must be on “CD-ROM or 3.5-inch disks.” Rather than enshrining
15 any particular technology in these rules, however, revised rule 34.2(i)(2) simply states that computer-
16 readable copies must comply with the statute (now Code Civ. Proc., § 271, subd. (b)) and “any additional
17 requirements prescribed by the Supreme Court.” The change is not meant to be substantive, but to
18 provide the flexibility necessary to ensure the record-preparation process remains current with evolving
19 computer technology.
20

21 Revised rule 34.2(i)(3) fills a gap; it is derived from former rule 39.54(f). Revised rule 34.2(i)(4)
22 restates a provision of former rule 35(b), second paragraph.
23

24 **Subdivision (j).** Former rule 39.52(j) required the clerk to send the pretrial record—including the
25 computer-readable copies—to the responsible superior court judge “[n]o later than five days after the
26 record has been certified.” This provision created an apparent inconsistency with former rule 39.52(i)(6),
27 which gave the reporter 20 days to prepare the same computer-readable copies after the judge certified the
28 record (see former rule 39.52(i)(5)). To resolve this inconsistency, revised rule 34.2(j) provides instead
29 that the five-day period for the clerk to act begins when the reporter delivers the computer-readable copies
30 to the clerk.
31

32 **Subdivision (l).** Former rule 39.52(k) required the clerk to notify the reporter if at any time the
33 death penalty was no longer sought “or available.” Revised rule 34.2(l) deletes the quoted phrase as
34 superfluous: it is assumed the prosecution will not seek the death penalty if for any reason the penalty is
35 or becomes unavailable.
36
37

38 **Rule 35. Preparing the trial record**

39

40 **(a) Clerk’s duties**

41

- 42 (1) The clerk must promptly—and no later than five days after the judgment
43 of death is rendered—notify the reporter to prepare the reporter’s
44 transcript.
45
- 46 (2) The clerk must prepare an original and eight copies of the clerk’s
47 transcript and two additional copies for each codefendant sentenced to
48 death.

- 1
2 (3) The clerk must certify the original and all copies of the clerk's transcript
3 as correct.
4

5 **(b) Reporter's duties**
6

- 7 (1) The reporter must prepare an original and five copies of the reporter's
8 transcript and two additional copies for each codefendant sentenced to
9 death.
10
11 (2) Any portion of the transcript transcribed during trial must not be retyped
12 unless necessary to correct errors, but must be repaginated and bound
13 with any portion of the transcript not previously transcribed. Any
14 additional copies needed must not be retyped but prepared by
15 photocopying or equivalent process.
16
17 (3) The reporter must certify the original and all copies of the reporter's
18 transcript as correct and deliver them to the clerk.
19

20 **(c) Sending the record to trial counsel**
21

22 Within 30 days after the judgment of death is rendered, the clerk must deliver
23 one copy of the clerk's and reporter's transcripts to each trial counsel, retaining
24 the original transcripts and the remaining copies. If counsel does not receive
25 the transcripts within that period, counsel must promptly notify the superior
26 court.
27

28 **(d) Extension of time**
29

- 30 (1) On request of the clerk or a reporter and for good cause, the superior court
31 may extend the period prescribed in (c) for no more than 30 days. For
32 any further extension the clerk or reporter must file a request in the
33 Supreme Court, showing good cause.
34
35 (2) A request under (1) must be supported by a declaration explaining why
36 the extension is necessary. The court may presume good cause if the
37 clerk's and reporter's transcripts combined will likely exceed 10,000
38 pages.
39
40 (3) If the superior court orders an extension under (1), the order must specify
41 the reasons justifying the extension. The clerk must promptly send a
42 copy of the order to the Supreme Court.
43

1 **Advisory Committee Comment**

2 Revised rule 35 is former rule 39.53, and implements Penal Code section 190.8, subdivision (b).
3

4 **Subdivision (a).** Revised rule 35(a)(1) deletes the provision of former rule 39.53(b)(2) that
5 required the clerk to deliver the notification of a judgment of death to the reporter “personally or to his or
6 her office or internal mail receptacle” and authorized the clerk to mail the notification if the reporter was
7 not a court employee; the provision was deemed to be unnecessary micromanagement of the clerk’s
8 office. (For the same reason, revised rules 4 and 32 delete similar provisions from the rules on appeals in
9 civil cases and noncapital criminal cases respectively.)
10

11 Revised rule 35(a)(2) deletes as redundant the provisions of former rule 39.53(b)(1) directing that
12 the clerk’s transcript must conform to rule 9 and must include the contents of the municipal court file.
13 The form and contents of the clerk’s transcript are prescribed in revised rule 34.1.
14

15 **Subdivision (b).** Revised rule 35(b)(1) deletes as redundant the provisions of former rule
16 39.53(b)(3) directing that the reporter’s transcript must conform to rule 9. The form of the reporter’s
17 transcript is prescribed in revised rule 34.1(d).
18

19 **Subdivision (c).** Former rule 39.53(b)(4) directed that the copies of the clerk’s and reporter’s
20 transcripts that the clerk sends to trial counsel for review be paper copies. Revised rule 35(c) deletes this
21 directive as superfluous: under revised rules 35.1 and 35.2 (former rules 39.54 and 39.55), computer-
22 readable copies of the reporter’s transcript are not prepared until the record has been certified as complete
23 and accurate, and no such copies of the clerk’s transcript are ever prepared.
24

25 Filling a gap, the second sentence of revised rule 35(c) restates a provision of Penal Code section
26 190.8, subdivision (b).
27

28 **Subdivision (d).** Former rule 39.53(b)(6) authorized the court to presume good cause to extend
29 the time to prepare the transcripts in cases in which the clerk’s and reporter’s transcripts combined
30 “exceed” 10,000 pages. By definition, however, the transcripts have not been completed at that point in
31 the process, so that it may not be possible to know whether in fact they “exceed” 10,000 pages. Revised
32 rule 35(d)(2) therefore provides that good cause may be presumed when the combined transcripts “will
33 likely” exceed 10,000 pages.
34
35

36 **Rule 35.1. Certifying the trial record for completeness**
37

38 **(a) Review by counsel during trial**
39

40 During trial, counsel must call the court’s attention to any errors or omissions
41 they may find in the transcripts. The court must periodically ask counsel for
42 lists of any such errors or omissions and may hold hearings to verify them.
43

44 **(b) Review by counsel after trial**
45

46 When the clerk delivers the clerk’s and reporter’s transcripts to trial counsel,
47 each counsel must promptly:

- (1) review the docket sheets and minute orders to determine if the reporter's transcript is complete;
- (2) consult with opposing counsel to determine if any other proceedings or discussions should have been transcribed; and
- (3) review the court file to determine if the clerk's transcript is complete.

(c) Declaration and request for additions or corrections

- (1) Within 30 days after the clerk delivers the transcripts, each trial counsel must serve and file a declaration stating that counsel or another person under counsel's supervision has performed the tasks required by (b), and either:
 - (A) a request to include additional materials in the record or to correct errors that have come to counsel's attention; or
 - (B) a statement that counsel does not request any additions or corrections.
- (2) A request for additions to the reporter's transcript must state the nature and date of the proceedings and identify the reporter who transcribed them.
- (3) If any counsel fails to timely file a declaration under (1), the judge must not certify the record and must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

(d) Completion of the record

If any counsel files a request for additions or corrections:

- (1) The clerk must promptly deliver the original transcripts to the judge who presided at the trial.
- (2) Within 15 days after the last request is filed, the judge must hold a hearing and order any necessary additions or corrections. The order must require that any additions or corrections be made within 10 days of its date.

- 1 (3) The clerk must promptly—and in any event within five days—notify the
2 reporter of an order under (2). If any portion of the proceedings cannot be
3 transcribed, the judge may order preparation of a settled statement under
4 rule 32.3.
5
6 (4) The original transcripts must be augmented or corrected to reflect all
7 additions or corrections ordered. The clerk must promptly send copies of
8 the additional or corrected pages to the parties.
9
10 (5) Within five days after the augmented or corrected transcripts are filed, the
11 judge must set another hearing to determine whether the record has been
12 completed or corrected as ordered. The judge may order further
13 proceedings to complete or correct the record.
14
15 (6) When the judge is satisfied that all additions or corrections ordered have
16 been made and copies of all additional or corrected pages have been sent
17 to the parties, the judge must certify the record as complete and redeliver
18 the original transcripts to the clerk.
19
20 (7) The judge must certify the record as complete within 90 days after the
21 judgment of death is rendered.
22

23 **(e) Computer-readable copies**
24

- 25 (1) When the record is certified as complete, the clerk must promptly notify
26 the reporter to prepare five computer-readable copies of the transcript and
27 an additional computer-readable copy for each codefendant sentenced to
28 death.
29
30 (2) Each computer-readable copy must comply with the format, labeling,
31 content, and numbering requirements of Code of Civil Procedure section
32 271, subdivision (b), and any additional requirements prescribed by the
33 Supreme Court, and must be further labeled to show the date it was made.
34
35 (3) A computer-readable copy of a sealed transcript must be placed on a
36 separate disk and clearly labeled as confidential.
37
38 (4) The reporter is to be compensated for computer-readable copies as
39 provided in Government Code section 69954, subdivision (b).
40
41 (5) Within 10 days after the clerk notifies the reporter under (1), the reporter
42 must deliver the computer-readable copies to the clerk.
43

1 **(f) Extension of time**

- 2
- 3 (1) The court may extend for good cause any of the periods specified in this
- 4 rule.
- 5
- 6 (2) An application to extend the 30-day period to review the record under (c)
- 7 must be served and filed within that period. If the clerk's and reporter's
- 8 transcripts combined exceed 10,000 pages, the court may grant an
- 9 additional three days for each 1,000 pages over 10,000.
- 10
- 11 (3) If the court orders an extension of time, the order must specify the reasons
- 12 justifying the extension. The clerk must promptly send a copy of the
- 13 order to the Supreme Court.
- 14

15 **(g) Sending the certified record**

16

17 When the record is certified as complete, the clerk must promptly send:

18

- 19 (1) To each defendant's appellate counsel and each defendant's habeas
- 20 corpus counsel: one paper copy of the entire record and one computer-
- 21 readable copy of the reporter's transcript. If either counsel has not been
- 22 retained or appointed, the clerk must retain that counsel's copies until
- 23 counsel is retained or appointed.
- 24
- 25 (2) To the Attorney General, the Habeas Corpus Resource Center, and the
- 26 California Appellate Project in San Francisco: one paper copy of the
- 27 clerk's transcript and one computer-readable copy of the reporter's
- 28 transcript.
- 29

30 **(h) Notice of delivery**

31

32 When the clerk sends the record to the defendant's appellate counsel, the clerk

33 must serve a notice of delivery on the Supreme Court clerk.

34

35 **Advisory Committee Comment**

36 Revised rule 35.1 is former rule 39.54, and implements Penal Code section 1190.8, subdivisions

37 (c)–(e).

38

39 **Subdivision (a).** Revised rule 35.1(a) restates Penal Code section 190.8, subdivision (c); the

40 wording is simplified, but no substantive change is intended.

41

42 **Subdivision (b).** As used in revised rule 35.1(b)—as in all rules in this part—trial counsel

43 “means both the defendant's trial counsel and the prosecuting attorney.” (Revised rule 34(e)(2).)

Revised rule 35.1(b)(2) fills a gap; it is derived from former rule 39.52(g)(4).

Subdivision (c). Revised rule 35.1(c)(1), like former rule 39.54(c)(1), requires counsel to file a declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record for completeness. But under the former rule, counsel who was satisfied with the state of the record—and therefore had determined not to request any additions—simply remained silent as to any such request, and the court was required to infer from that silence that counsel did not intend to make the request. In a substantive change designed to avoid any misunderstanding of counsel’s intent on this important point, revised rule 35.1(c)(1)(B) requires counsel, as part of the required declaration, to express any intent not to request corrections or additions.

Subdivision (e). Former rule 39.54(f) required computer-readable copies of the transcript to comply with Code of Civil Procedure section 269, subdivision (c), and former rule 35(b), and the latter rule specified that such copies must be on “CD-ROM or 3.5-inch disks.” Rather than enshrining any particular technology in these rules, however, revised rule 35.1(e)(2) simply states that computer-readable copies must comply with the statute (now Code Civ. Proc., § 271, subd. (b)) and “any additional requirements prescribed by the Supreme Court.” The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology.

Revised rule 35.1(e)(4) restates a provision of former rule 35(b), second paragraph.

Rule 35.2. Certifying the trial record for accuracy

(a) Request for corrections or additions

- (1) Within 90 days after the clerk delivers the record to appellate counsel, any party may serve and file a request for corrections or additions.
- (2) A request to include additions to the reporter’s transcript must state the nature and date of the proceedings and identify the reporter who transcribed them.

(b) Correction of the record

- (1) If any counsel files a request for corrections or additions, the procedures and time limits of rule 35.1(d)(1)–(5) must be followed.
- (2) When the judge is satisfied that all corrections or additions ordered have been made, the judge must certify the record as accurate and redeliver the record to the clerk.
- (3) The judge must certify the record as accurate within 120 days after it is delivered to appellate counsel.

1
2 **(c) Computer-readable copies**
3

- 4 (1) When the record is certified as accurate, the clerk must promptly notify
5 the reporter to prepare six computer-readable copies of the reporter's
6 transcript and an additional computer-readable copy for each codefendant
7 sentenced to death.
8
9 (2) In preparing the computer-readable copies, the procedures and time limits
10 of rule 35.1(e)(2)–(5) must be followed.
11

12 **(d) Extension of time**
13

- 14 (1) The court may extend for good cause any of the periods specified in this
15 rule.
16
17 (2) An application to extend the 90-day period to request corrections or
18 additions under (a) must be served and filed within that period. If the
19 clerk's and reporter's transcripts combined exceed 10,000 pages, the court
20 may grant an additional 15 days for each 1,000 pages over 10,000.
21
22 (3) If the court orders an extension of time, the order must specify the reasons
23 justifying the extension. The clerk must promptly send a copy of the
24 order to the Supreme Court.
25
26 (4) If the court orders an extension of time, the court may conduct a status
27 conference or require the defendant's appellate counsel to file a status
28 report on counsel's progress in reviewing the record.
29

30 **(e) Sending the certified record**
31

32 When the record is certified as accurate, the clerk must promptly send:
33

- 34 (1) To the Supreme Court: the corrected original record, including the judge's
35 certificate of accuracy, and a computer-readable copy of the reporter's
36 transcript.
37
38 (2) To each defendant's appellate counsel, each defendant's habeas corpus
39 counsel, the Attorney General, the Habeas Corpus Resource Center, and
40 the California Appellate Project in San Francisco: a copy of the order
41 certifying the record and a computer-readable copy of the reporter's
42 transcript.
43

- 1 (3) To the Governor: the copies of the transcripts required by Penal Code
2 section 1218, with copies of any corrected or augmented pages inserted.
3

4 **Advisory Committee Comment**

5 Revised rule 35.2 restates former rules 39.55 and 39.56, and implements Penal Code section
6 190.8, subdivision (g).
7

8 **Subdivision (c).** The provisions of former rule 39.55(e) specifying the format of the computer-
9 readable copies of the reporter's transcript now appear in revised rule 35.1(e).
10

11 **Subdivision (d).** Former rule 39.55(h) authorized the court, after granting an extension of time,
12 to conduct a status conference or require defense counsel to file a status report "90 days after the delivery
13 of the record to [counsel], or at some other reasonable time . . ." Because it may be assumed the court
14 will not fix an *unreasonable* time for this purpose, revised rule 35.2(d)(4) deletes the quoted provision as
15 unnecessary. No substantive change is intended.
16

17 **Subdivision (e).** Revised rule 35.2(e) is former rule 39.56. After the record is certified, former
18 rule 39.56(2)–(3) directed the clerk to send the parties "a notice enumerating all corrections ordered and
19 stating a date of certification," as well as copies of all the corrected transcript pages. Under revised rule
20 35.1(d)(4), however, the corrected pages are sent to the parties before certification, and to send a belated
21 list of "all corrections ordered" would serve little purpose. Revised rule 35.2(e) therefore deletes these
22 directives in favor of a copy of the certification order for the parties and a copy of the transcripts and the
23 corrected pages for the Governor.
24
25

26 **Rule 35.3. Certifying the record in pre-1997 trials**
27

28 **(a) Application**
29

30 This rule governs the process of certifying the record in any appeal from a
31 judgment of death imposed after a trial that began before January 1, 1997.
32

33 **(b) Sending the transcripts to counsel for review**
34

- 35 (1) When the clerk and the reporter certify that their respective transcripts are
36 correct, the clerk must promptly send a copy of each transcript to each
37 defendant's trial counsel, to the Attorney General, to the district attorney,
38 and to the California Appellate Project in San Francisco, noting the
39 sending date on the originals.
40

- 41 (2) The copy of the reporter's transcript sent to the California Appellate
42 Project must be a computer-readable copy complying with the format,
43 labeling, content, and numbering requirements of Code of Civil Procedure
44 section 271, subdivision (b), and any additional requirements prescribed

1 by the Supreme Court, and must be further labeled to show the date it was
2 made.

- 3
4 (3) When the clerk is notified of the appointment or retention of each
5 defendant's appellate counsel, the clerk must promptly send that counsel
6 copies of the clerk's transcript and the reporter's transcript, noting the
7 sending date on the originals. The clerk must notify the Supreme Court,
8 the Attorney General, and each defendant's appellate counsel in writing
9 of the date the transcripts were sent to appellate counsel.

10
11 **(c) Correcting, augmenting, and certifying the record**
12

- 13 (1) Within 90 days after the clerk delivers the transcripts to each defendant's
14 appellate counsel, any party may serve and file a request for correction or
15 augmentation of the record. Any request for extension of time must be
16 served and filed in the Supreme Court no later than five days before the
17 90-day period expires.
18
19 (2) If no party files a timely request for correction or augmentation, the clerk
20 must certify on the original transcripts that no party objected to the
21 accuracy or completeness of the record within the time allowed by law.
22
23 (3) Within 10 days after any party files a timely request for correction or
24 augmentation, the clerk must deliver the request and the transcripts to the
25 trial judge.
26
27 (4) Within 60 days after receiving a request and transcripts under (3), the
28 judge must order the reporter, clerk, or party to make any necessary
29 corrections or do any act necessary to complete the record, fixing the time
30 for performance. If any portion of the oral proceedings cannot be
31 transcribed, the judge may order preparation of a settled statement under
32 rule 32.3.
33
34 (5) The clerk must promptly send a copy of any order under (4) to the parties
35 and to the Supreme Court, but any request for extension of time to
36 comply with the order must be addressed to the trial judge.
37
38 (6) The original transcripts must be corrected or augmented to reflect all
39 corrections or augmentations ordered. The clerk must promptly send
40 copies of all corrected or augmented pages to the parties.
41
42 (7) The judge must allow the parties a reasonable time to review the
43 corrections or augmentations. If no party objects to the corrections or

1 augmentations as prepared, the judge must certify that the record is
2 accurate and complete. If any party objects, the judge must resolve the
3 objections before certifying the record.
4

- 5 (8) If the record is not certified within 90 days after the clerk sends the
6 transcripts to appellate counsel under (b)(2), the judge must monitor
7 preparation of the record to expedite certification and report the status of
8 the record monthly to the Supreme Court.
9

10 **(d) Sending the certified record**
11

12 When the clerk certifies that no party objected to the record or the judge
13 certifies that the record is accurate and complete, the clerk must promptly send:
14

- 15 (1) To the Supreme Court: the original record.
16
17 (2) To each defendant's appellate counsel, the Attorney General, and the
18 California Appellate Project in San Francisco: a copy of the order
19 certifying the record.
20
21 (3) To the Governor: the copies of the transcripts required by Penal Code
22 section 1218, with copies of any corrected or augmented pages inserted.
23

24 **(e) Subsequent trial court orders; omissions**
25

- 26 (1) If, after the record is certified, the trial court amends or recalls the
27 judgment or makes any other order in the case, including an order
28 affecting the sentence, the clerk must promptly certify and send a copy of
29 the amended abstract of judgment or other order—as an augmentation of
30 the record—to the persons and entities listed in (d).
31
32 (2) If, after the record is certified, the superior court clerk or the reporter
33 learns that the record omits a document or transcript that any rule or court
34 order requires to be included, the clerk must promptly copy and certify
35 the document or the reporter must promptly prepare and certify the
36 transcript. Without the need for further court order, the clerk must send
37 the document or transcript—as an augmentation of the record—to the
38 persons and entities listed in (d).
39
40

Advisory Committee Comment

41 Revised rule 35.3 has limited application, as explained in subdivision (a). It restates portions of
42 former rule 35 relating to death penalty appeals, supplemented by new provisions derived from former
43 rules 39.52 to 39.55.

1
2 **Subdivision (b).** Revised rule 35.3(b) is based on former rule 35(b) and (c)(1)–(3). Former rule
3 35(b) specified that computer-readable copies of the transcript must be on “CD-ROM or 3.5-inch disks.”
4 Rather than enshrining any particular technology in these rules, however, revised rule 35.3(b)(2) simply
5 states that computer-readable copies must comply with the relevant statute (Code Civ. Proc., § 271, subd.
6 (b)) and “any additional requirements prescribed by the Supreme Court.” The change is not meant to be
7 substantive, but to provide the flexibility necessary to ensure the record-preparation process remains
8 current with evolving computer technology. The date-labeling requirement is derived from former rules
9 39.52(i)(6) and 39.54(f).

10
11 **Subdivision (c).** Revised rule 35.3(c) is based on former rule 35(c)(4). The revised subdivision
12 provides for augmentation of the record (in addition to correction), consistently with practice and with the
13 law governing death penalty appeals in post-1996 cases (see Pen. Code, § 190.8, subd. (a), and former
14 rule 39.54).

15
16 The second sentence of paragraph (1) of revised rule 35.3(c) is a substantive change intended to
17 expedite record correction and facilitate Supreme Court supervision of the process.

18
19 The second sentence of paragraph (4) of revised rule 35.3(c) fills a gap and reflects current
20 practice. Former rule 35(c)(4) also directed the court to determine which corrections have “sufficient
21 potential significance” to require them to be furnished to the parties in the form of corrected pages, and
22 directed the corrections to be made “by strikeover and interlineations where possible.” The revised rule
23 deletes these provisions as unnecessary micromanagement of the correction process and inconsistent with
24 the intent of the statutes and rules governing death penalty appeals in post-1996 cases.

25
26 Paragraph (5) of revised rule 35.3(c) is a substantive change intended to facilitate Supreme Court
27 supervision of the process of record correction while preserving the trial court’s discretion to extend time
28 to comply with its orders.

29
30 Paragraphs (6) and (7) of revised rule 35.3(c) fill gaps in the correction process. They are derived
31 from former rule 39.54(d)(3) and (4), respectively.

32
33 Paragraph (8) of revised rule 35.3(c) is derived from former Penal Code section 190.8 and is
34 intended to facilitate Supreme Court supervision of the process of record correction.

35
36 **Subdivision (d).** After the record is certified, former rule 35(e) directed the clerk to send the
37 parties “notices enumerating all corrections ordered and stating a date of certification,” as well as copies
38 of all the corrected transcript pages. Under revised rule 35.3(c)(6), however, the corrected pages are sent
39 to the parties before certification, and to send a belated list of “all corrections ordered” would serve little
40 purpose. Revised rule 35.3(d) therefore deletes these directives in favor of a copy of the certification
41 order for the parties and a copy of the transcripts and the corrected pages for the Governor.

42
43 **Subdivision (e).** Revised rule 35.3(e) is derived from the last two paragraphs of former rule
44 35(e).

45
46 **Former rule 35(e).** Former rule 35(e) also provided for the transmission of certain exhibits in
47 criminal appeals. Revised rule 36.1 now governs all matters relating to the transmission of exhibits in
48 death penalty appeals.

1 **Rule 36. Briefs**

2
3 **(a) Contents and form**

4
5 Except as provided in this rule, briefs in appeals from judgments of death must
6 comply as nearly as possible with rules 13 and 14.
7

8 **(b) Length**

9
10 (1) A brief produced on a computer must not exceed the following limits,
11 including footnotes:
12

13 (A) Appellant's opening brief and respondent's brief: 78,400 words.

14
15 (B) Reply brief: 39,200 words.

16
17 (C) Petition for rehearing and answer: 19,600 words.
18

19 (2) A brief under (1) must include a certificate by appellate counsel stating
20 the number of words in the brief. Counsel may rely on the word count of
21 the computer program used to prepare the brief.
22

23 (3) A typewritten brief must not exceed the following limits:
24

25 (A) Appellant's opening brief and respondent's brief: 280 pages.

26
27 (B) Reply brief: 140 pages.

28
29 (C) Petition for rehearing and answer: 70 pages.
30

31 (4) The tables, a certificate under (2), and any attachment permitted under
32 rule 14(d) are excluded from the limits stated in (1) or (3).
33

34 (5) On application, the Chief Justice may permit a longer brief for good
35 cause.
36

37 **(c) Time to file**

38
39 (1) Except as provided in (2), the time to file briefs in any appeal from a
40 judgment of death is as follows:
41

42 (A) When the record is certified as complete or the superior court clerk
43 delivers the completed record to the defendant's appellate counsel,

1 whichever is later, the Supreme Court clerk must notify the
2 defendant's appellate counsel and the Attorney General of the due
3 date for the appellant's opening brief.
4

5 (B) The appellant's opening brief must be served and filed within 210
6 days after the record is certified as complete or the superior court
7 clerk delivers the completed record to the defendant's appellate
8 counsel, whichever is later.
9

10 (C) When the appellant's opening brief is filed, the Supreme Court clerk
11 must notify the Attorney General of the due date for the respondent's
12 brief.
13

14 (D) The respondent's brief must be served and filed within 120 days
15 after the appellant's opening brief is filed.
16

17 (E) If the clerk's and reporter's transcripts combined exceed 10,000
18 pages, the time limits stated in (B) and (D) are extended by 15 days
19 for each 1,000 pages of combined transcript over 10,000 pages.
20

21 (F) The appellant must serve and file a reply brief, if any, within 60 days
22 after the respondent files its brief.
23

24 (2) In any appeal from a judgment of death imposed after a trial that began
25 before January 1, 1997, the time to file briefs is governed by rule 33(c).
26

27 (3) The Chief Justice may extend the time to serve and file a brief for good
28 cause.

29 **(d) Supplemental briefs**

30 Supplemental briefs may be filed as provided in rule 29.1(d).

31 **(e) Briefs on the court's request**

32 The court may request additional briefs on any or all issues.

33 **(f) Service**

34 (1) The Attorney General must serve two copies of the respondent's brief on
35 each defendant's appellate counsel. For each defendant sentenced to
36 death, the Attorney General must also serve one copy of the respondent's
37 brief on the California Appellate Project in San Francisco.

1 (2) Copies of all briefs must be served on the superior court clerk for delivery
2 to the trial judge.

3 (3) The Supreme Court Policy on Service of Process by Counsel for
4 Defendant governs service of the defendant's briefs.

5 **(g) Judicial notice**

6 To obtain judicial notice by the Supreme Court under Evidence Code section
7 459, a party must comply with rule 22(a).

8 **Advisory Committee Comment**

9 **Subdivision (a).** Revised rule 36(a) restates former rule 37(c).

10 **Subdivision (b).** Revised rule 36(b)(1) states the maximum permissible length of a brief
11 produced on a computer in terms of word count rather than page count. This substantive change tracks an
12 identical provision in revised rule 14(c) governing Court of Appeal briefs, and is explained in the
13 Comment to that provision.

14 Filling a gap, subdivisions (b)(1)(C) and (b)(3)(C) of revised rule 36 provide for the maximum
15 permissible length of an answer to a petition for rehearing.

16 Filling a gap, revised rule 36(b)(4) provides that any attachment under rule 14(d) is to be
17 excluded in calculating the length of a brief. The provision is derived from revised rule 14(c)(3).

18 **Subdivision (c).** Subdivision (c)(1) of revised rule 36 restates former rule 39.57; subdivision
19 (c)(2) restates former rule 39.50(a) insofar as it applied to the time to file briefs.

20 Former rule 39.57(e) provided that the Supreme Court could extend the time to serve and file
21 briefs for good cause, "in accordance with the policies and factors contained in rule 45.5, to the extent
22 they are applicable." Revised rule 36(c)(3) recognizes that this power is vested in the Chief Justice (see
23 rule 45(c)), and deletes the cross-reference to rule 45.5 as unnecessary. No substantive change is
24 intended.

25 **Subdivision (f).** The first sentence of revised rule 36(f)(1) is derived from former rule 37(a); the
26 second sentence states current practice. Revised rule 36(f)(3) is a cross-reference to Policy 4 of the
27 Supreme Court Policies Regarding Cases Arising from Judgments of Death.

28
29 **Rule 36.3. Decision in the Supreme Court**
30

31 Rules 29.4 through 29.7 govern the decision in the Supreme Court in an appeal from
32 a judgment of death.
33

34 **Advisory Committee Comment**
35

1 Revised rule 36.3 is new, but is not a substantive change. It clarifies the applicability, to death
2 penalty appeals, of the relevant rules governing the decision of civil appeals in the Supreme Court.
3
4

5 **Rule 36.1. Transmitting exhibits ~~in death penalty appeals~~**
6

7 **(a) Application**
8

9 Except as provided in this rule, rule 18 governs the transmission of exhibits to
10 the Supreme Court.
11

12 **(b) Time to file notice of designation**
13

14 No party may file a notice of designation under rule 18(a) until the Supreme
15 Court clerk notifies the parties of the time and place of oral argument.
16

17 **Advisory Committee Comment**

18 New rule 36.1(b) restates the first clause of former rule 10(d) insofar as it applies to death penalty
19 appeals.
20

21 **Rule 36.2. Oral argument and submission of the cause ~~in death penalty appeals~~**
22

23 **(a) Application**
24

25 Except as provided in this rule, rule 29.2 governs oral argument and
26 submission of the cause in death penalty appeals in the Supreme Court unless
27 the court provides otherwise in its Internal Operating Practices and Procedures
28 or by order.
29

30 **(b) Procedure**
31

- 32 (1) The appellant has the right to open and close.
33
34 (2) Each side is allowed 45 minutes for argument.
35
36 (3) Two counsel may argue on each side if, not later than 10 days before the
37 date of the argument, they notify the court that the case requires it.
38

39 **Advisory Committee Comment**

40 New rule 36.2 is derived from former rule 22.
41

42 **Subdivision (b).** Former rule 22(d) required counsel to notify the court not later than 10 days
43 before “the date of the argument” if two counsel wanted to argue a death penalty appeal on each side;

subdivision (b)(3) of rule 36.2 requires the same notice within 10 days after “the date of the order setting the case for argument.” The purpose of the change is to coordinate this provision with the provision governing requests to divide oral argument among multiple counsel in non-death-penalty appeals (revised rule 29.2(f)(2)). In most cases, however, the revised wording will yield a deadline identical to or no later than that yielded by the former wording, because of the provision requiring the clerk to give the parties at least 20 days’ notice of the date of the argument (revised rule 29.2(c)).

Rule 39.50. Appeals in death penalty cases

~~(a) [General] The rules governing appeals from the superior court in other criminal cases apply to appeals from judgments rendering the penalty of death except where otherwise provided by these rules, 39.50 through 39.57.~~

~~(Subd (a) amended effective March 1, 1997.)~~

~~(b) [Interpretation] These rules 39.50 through 39.57 shall be interpreted to effectuate the intent of the Legislature, as stated in Penal Code section 190.8, subdivision (a), that the record in death penalty appeals be expeditiously certified.~~

~~(Subd (b) adopted effective March 1, 1997.)~~

~~(c) [Definition of delivery] For purposes of rules 39.50 through 39.57, if a transcript is mailed, the date of delivery is the date of mailing plus five days.~~

~~(Subd (c) adopted effective January 1, 1999.)~~

~~(d) [Extensions of time in the trial court] Wherever these rules 39.50 through 39.57 allow the trial court to grant an extension of the time limits specified in these rules, the court may consider the policies and factors contained in rule 45.5, to the extent they are applicable.~~

~~(Subd (d) amended effective January 1, 1999; adopted as subd (c) effective March 1, 1997.)~~

~~(e) [Notification by clerk] The clerk of the superior court shall, forthwith upon its rendition, mail certified copies of the judgment imposing the penalty of death to the Clerk of the Supreme Court and to the Attorney General.~~

~~(Subd (e) relettered effective January 1, 1999; previously relettered as subd (d) effective March 1, 1997; adopted effective January 1, 1983, as subd (b).)~~

~~Rule 39.50 amended effective January 1, 1999; adopted effective March 1, 1997.~~

1 **Former Rules**

2 Former rule 39.5 was amended and renumbered effective March 1, 1997, as rules 39.50 and
3 39.51.

4 **Drafter's Notes**

5 ~~1999~~ Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the
6 time limit for filing a motion to correct the record in capital cases in which the trial commenced
7 before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable
8 to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the
9 reporter's transcript be delivered to the Attorney General in computer-readable form only; and
10 (4) require that copies of the record be provided for postconviction counsel and the Habeas
11 Corpus Resource Center.

12
13 **Rule 39.51. Record in death penalty cases**

14
15 ~~(a) [Contents of record]~~ When a judgment of death has been rendered, the entire
16 record, consisting of

17
18 ~~(1) (Clerk's transcript)~~ The clerk's transcript shall include all documents filed
19 or lodged in the municipal and superior court files in the case, including
20 all items listed in rule 33(a) and juror questionnaires of all potential
21 jurors, regardless of whether the jurors were selected to sit on the case.

22
23 ~~(2) (Reporter's transcript)~~ The reporter's transcript shall include transcripts of
24 all oral proceedings in the municipal and superior courts in the case,
25 including transcripts of prior proceedings in the same case that did not
26 result in a verdict or the death penalty because of a mistrial or an order
27 granting a new trial.

28
29 *(Subd (a) amended effective March 1, 1997; adopted as subd (c) of rule 39.5 effective*
30 *January 1, 1983.)*

31
32 ~~(b) [Confidential transcripts]~~ All documents filed confidentially under Penal
33 Code section 987.9 or 987.2 shall be sealed and copies provided only to the
34 reviewing court and to counsel for the defendant to whom the documents
35 relate. All transcripts of in camera proceedings shall be sealed and copies
36 provided only to the reviewing court and to counsel for those parties present at
37 the proceedings.

38
39 *(Subd (b) amended effective July 1, 2001.)*

1
2 ~~(e) — [Additional material] This rule does not affect the power of the Supreme~~
3 ~~Court or superior court to order inclusion of additional matter.~~

4
5 *Rule 39.51 amended effective July 1, 2001; adopted effective March 1, 1997.*
6

7
8 **~~Rule 39.52. Preparation and certification of transcripts of preliminary proceedings~~**
9 **~~in death penalty cases~~**

10
11 ~~(a) — [Application] This rule applies to capital cases in the superior court,~~
12 ~~addressing the preparation and certification of transcripts of oral proceedings~~
13 ~~in a capital case prior to and including the preliminary hearing. Those~~
14 ~~transcripts must be prepared and certified in accordance with Penal Code~~
15 ~~section 190.9(a) and the following procedures.~~

16
17 *(Subd (a) amended effective January 1, 2002.)*
18

19 ~~(b) — [Notice to prepare record] Upon receiving notification from the prosecution~~
20 ~~that the death penalty is being sought, the responsible superior court judge~~
21 ~~must enter that information on the record and notify the presiding judge and~~
22 ~~clerk of the court.~~

23
24 ~~(1) — The responsible superior court judge is the judge assigned to try the case~~
25 ~~or, if none has been assigned, the presiding judge or a designee of the~~
26 ~~presiding judge.~~

27
28 ~~(2) — Notification from the prosecution to the superior court is deemed to have~~
29 ~~been given, for the purposes of this rule only, 60 days before the first date~~
30 ~~set for trial on a charge that may result in the death penalty unless the~~
31 ~~prosecution has previously given notice that it does not intend to seek the~~
32 ~~death penalty.~~

33
34 *(Subd (b) amended effective January 1, 2002.)*
35

36 ~~(c) — [Assignment of judge] Within five days of receiving notification from the~~
37 ~~responsible superior court judge that the death penalty is being sought, the~~
38 ~~presiding judge must assign to the judge who presided at the preliminary~~
39 ~~hearing the responsibility for preparation of the record of all proceedings prior~~
40 ~~to and including the preliminary hearing in that case.~~

41
42 *(Subd (c) amended effective January 1, 2002.)*
43

1 ~~(d) [Notice to prepare transcripts; designation of primary reporter]~~ Within
2 five days of receiving notice that the death penalty is being sought, the clerk
3 must notify each and every court reporter who has reported any hearing,
4 conference, or proceeding prior to and including the preliminary hearing,
5 whether in chambers or in open court, in the case. If there has been more than
6 one reporter, the judge who presided at the preliminary hearing may assign one
7 reporter or other designee to perform the functions of the primary reporter as
8 specified in rule 9(f).

9
10 *(Subd (d) amended effective January 1, 2002.)*
11

12 ~~(e) [Preparation and number of copies]~~ Each reporter must prepare an original
13 transcript and five paper copies of the proceedings in the manner and form
14 required by rule 9, and two additional copies for each co-defendant against
15 whom the prosecution is seeking the death penalty. A certificate attesting that
16 the transcript is correct must be attached to each original and each paper copy.

17
18 This subdivision requires preparation of the transcript of the preliminary
19 hearing unless that transcript has already been filed with the superior court for
20 the purpose of including it in the superior court clerk's transcript.

21
22 *(Subd (e) amended effective January 1, 2002.)*
23

24 ~~(f) [Delivery of reporter's transcript]~~ Within 20 days of notification by the clerk
25 to prepare the reporter's transcript, the primary reporter or other designee, if
26 one has been designated pursuant to subdivision (d), must deliver the original
27 and all copies to the clerk. Within five days of receipt of the reporter's
28 transcripts, the clerk must deliver the original of the reporter's transcript to the
29 designated judge responsible for preparation of the record in the case, one copy
30 to each defendant or, if the defendant is represented by counsel, to his or her
31 trial attorney, and one copy to the prosecuting attorney. Confidential
32 transcripts must be sealed and copies provided only to counsel for those parties
33 who were present at the confidential proceeding.

34
35 *(Subd (f) amended effective January 1, 2002.)*
36

37 ~~(g) [Review by counsel]~~ To determine whether to file a request for corrections or
38 for additional transcripts or documents, trial counsel must perform the tasks
39 listed in paragraphs (g)(1) through (g)(4). If a different attorney represented the
40 defendant prior to or at the preliminary hearing, trial counsel must perform
41 those tasks to the best of his or her ability and the attorney who appeared at the
42 preliminary hearing must also perform those tasks.
43

- ~~(1) Review the docket sheets to ensure that transcripts of all proceedings have been made;~~
- ~~(2) Examine the court file to determine whether it is complete;~~
- ~~(3) Review the reporter's transcript; and~~
- ~~(4) Consult with opposing counsel to determine whether all other discussions have been properly transcribed.~~

~~(Subd (g) amended effective January 1, 2002; previously amended effective January 1, 1999.)~~

~~(h) [Declaration and request for corrections and additional transcripts] No later than 30 days after delivery of the transcripts, counsel for the prosecution and for the defense must each file with the court one of the following:~~

- ~~(1) A declaration stating that he or she has performed the tasks required by subdivision (g) of this rule, or that they have been performed under counsel's supervision. If trial counsel did not represent the defendant at the preliminary hearing, the attorney who represented the defendant at the preliminary hearing must also file a declaration stating whether he or she performed the tasks required by subdivision (g);~~
- ~~(2) A declaration as described in paragraph (h)(1) and a request for corrections of or additions to the reporter's transcript or the court file; or~~
- ~~(3) A request for extension of time to file the declaration and request.~~

~~(Subd (h) amended effective January 1, 2002; previously amended effective January 1, 1999.)~~

~~(i) [Certification] If any counsel fails to file the declaration or request for extension of time as required by subdivision (h) of this rule, the court must not certify the record and must use all reasonable means to ensure compliance with this rule. The court must set the matter for a hearing, require the attorney to show cause why he or she has not complied with the rule, and set a date for the attorney to comply. If a declaration is filed without a request for corrections or additions, the designated judge must certify the record of the proceedings prior to and including the preliminary hearing as complete and correct. If one or more requests for corrections or additions are filed, the following procedures must be followed:~~

- ~~(1) The designated judge must hold a hearing within 15 days of the filing of the request and must make a determination on all requests.~~

1
2 (2) ~~The original reporter's transcript must be corrected to reflect all~~
3 ~~corrections ordered. All corrections must be furnished to the parties in the~~
4 ~~form of copies of corrected transcript pages.~~

5
6 (3) ~~The corrected and additional transcripts and documents must be delivered~~
7 ~~to the designated judge no later than 20 days after the hearing.~~

8
9 (4) ~~The court may order further proceedings for correcting or completing the~~
10 ~~record as needed.~~

11
12 (5) ~~When the court's order has been satisfied, the judge must certify that the~~
13 ~~objections have been properly corrected and must notify the reporter to~~
14 ~~prepare the corrected transcripts.~~

15
16 (6) ~~Once the reporter has been notified to prepare the corrected transcripts~~
17 ~~under subdivision (i)(5), within 20 days he or she must also provide six~~
18 ~~computer readable copies of the corrected transcript, conforming to the~~
19 ~~requirements of Code of Civil Procedure section 269(c) and rule 35(b),~~
20 ~~and an additional computer readable copy for each co-defendant against~~
21 ~~whom the prosecution is seeking the death penalty, each labeled to show~~
22 ~~the date on which the computer-readable copy was made.~~

23
24 *(Subd (i) amended effective January 1, 2002; previously amended effective January 1, 1999.)*
25

26 (j) ~~[Delivery to superior court] No later than five days after the record has been~~
27 ~~certified, the clerk must deliver to the responsible superior court judge for~~
28 ~~inclusion in the superior court record:~~

29
30 (1) ~~The corrected and certified original reporter's transcript and those copies~~
31 ~~that have not been distributed to counsel, including the computer-readable~~
32 ~~copies, and~~

33
34 (2) ~~The court file or a certified copy of the court file.~~

35
36 *(Subd (j) amended effective January 1, 2002.)*
37

38 (k) ~~[Notice that death penalty is no longer being sought] If at any time the death~~
39 ~~penalty is no longer sought or available in a case in which the presiding judge~~
40 ~~of the superior court has ordered preparation of the record, the superior court~~
41 ~~clerk must promptly notify the reporters that the requirements under this rule~~
42 ~~no longer apply.~~
43

1 ~~(Subd (k) amended effective January 1, 2002.)~~

2
3 ~~(l) [Extension of time] The court may extend any of the time periods specified by~~
4 ~~this rule for good cause only, but may not extend the 120-day period specified~~
5 ~~in Penal Code section 190.9(a)(2) for delivery of the record to the responsible~~
6 ~~superior court judge.~~

7
8 ~~(1) The court may request an extension of the 120-day period for delivery of~~
9 ~~the record by presenting to the responsible superior court judge a~~
10 ~~declaration containing a specific statement of reasons the time limits~~
11 ~~cannot be met.~~

12
13 ~~(2) The responsible superior court judge may not extend the time for more~~
14 ~~than an aggregate of 90 days except in an exceptional case. If the court~~
15 ~~extends the time for more than 90 days, it must state on the record its~~
16 ~~specific reasons for doing so.~~

17
18 ~~(Subd (l) amended effective January 1, 2002.)~~

19
20 ~~Rule 39.52 amended effective January 1, 2002; adopted effective March 1, 1997; previously~~
21 ~~amended effective January 1, 1999.~~

22
23 **Drafter's Notes:**

24 ~~2002-~~The rule has been amended to implement revisions made necessary by unification of the
25 courts.

26
27 **~~Rule 39.53. Preparation of the record in death penalty cases~~**

28
29 ~~(a) [Cases commenced prior to January 1, 1997] In cases in which the trial~~
30 ~~commenced prior to January 1, 1997, the time limits for preparation and~~
31 ~~certification of the record are those specified in rule 35. For purposes of~~
32 ~~computing time for preparation of the record, the notice of appeal shall be~~
33 ~~deemed to have been filed at the time of rendition of the judgment.~~

34
35 ~~(Subd (a) amended effective January 1, 1999; previously amended effective March 1, 1997.)~~

36
37 ~~(b) [Cases commenced on or after January 1, 1997] In cases in which the trial~~
38 ~~commenced on or after January 1, 1997, the record shall be prepared in~~
39 ~~accordance with Penal Code section 190.8 and the following procedures:~~

- 1 (1) ~~(Preparation of clerk's transcript)~~ Upon the entry of a judgment of death,
2 the superior court clerk shall prepare an original and eight copies of the
3 clerk's transcript, in the manner and form required by rule 9. The clerk's
4 transcript shall include the contents of the municipal court file. The clerk
5 shall append to the original and each copy a certificate that it is correct.
6 When more than one co-defendant is sentenced to death, the clerk shall
7 prepare two copies for each additional co-defendant sentenced to death.
8
- 9 (2) ~~(Notice to prepare reporter's transcript)~~ The clerk, promptly upon the
10 entry of a judgment of death, and in any event within five days after entry
11 of the judgment, shall notify the reporter. The notice shall be delivered to
12 the reporter personally or to his or her office or internal mail receptacle; if
13 the reporter is not employed by the court, the notice may be mailed.
14
- 15 (3) ~~(Preparation and number of copies)~~ The reporter shall prepare an original
16 and five clearly legible copies of the reporter's transcript and two
17 additional copies for each additional co-defendant sentenced to death, in
18 the manner and form required by rule 9. A certificate that the document is
19 correct shall be attached to the original and to each copy. Portions of the
20 transcript that were prepared during the trial shall not be retyped unless
21 necessary to correct errors. These portions shall be renumbered and bound
22 together with transcripts of any portions of the proceedings not previously
23 transcribed. If additional copies are needed, they shall be prepared by
24 photocopying or an equivalent process and not by retyping.
25
- 26 (4) ~~(Delivery)~~ The primary reporter shall deliver the original and all copies to
27 the clerk. The clerk shall deliver one paper copy of the clerk's transcript
28 and the reporter's transcript each to the prosecuting attorney and to the
29 attorney who represented the defendant at the trial, no later than the 30-
30 day deadline mandated by Penal Code section 190.8(b). The clerk shall
31 retain the original transcript and the remaining copies.
32
- 33 (5) ~~(Extension of time for preparation of the clerk's or reporter's transcript)~~
34 The superior court may grant an extension of the 30-day deadline for
35 preparation of the transcripts mandated by Penal Code section 190.8(b)
36 upon request of the clerk or a reporter for good cause only, for up to 30
37 additional days only. Any further extension of time may be granted only
38 by the Supreme Court.
39
- 40 (6) ~~(Request for extension of time)~~ The clerk or reporter shall request an
41 extension by presenting to the superior court or the Supreme Court a
42 declaration containing a specific statement of reasons the time limits

cannot be met. Good cause may be presumed in cases in which the clerk's and reporter's transcripts combined exceed 10,000 pages.

~~(7) — (Order extending time) If the superior court grants an extension of time for preparation of the record, it shall state in a written order the specific reasons that justify the extension. A copy of the order shall be promptly delivered to the Supreme Court.~~

~~(Subd (b) amended effective January 1, 1999; adopted effective March 1, 1997.)~~

~~Rule 39.53 amended effective January 1, 1999; adopted effective March 1, 1997.~~

Drafter's Notes

~~1999 Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.~~

Rule 39.54. Certification of record for completeness in death penalty cases

~~(a) — [General] In death penalty cases in which the trial commenced after January 1, 1997, the trial court shall certify the record for completeness in accordance with Penal Code section 190.8 and this rule.~~

~~(b) — [Review of record by trial attorneys] Both the defense attorney and the prosecuting attorney shall review the docket sheets and minute orders to determine whether the reporter's transcript is complete, and shall review the superior court file to determine whether the clerk's transcript is complete.~~

~~(c) — [Declaration and request for additions or corrections] No later than 30 days after delivery of the transcripts to counsel, the prosecuting attorney and the defense attorney shall each file with the superior court one of the following:~~

~~(1) — A declaration stating that he or she has performed the tasks required by subdivision (b) of this rule or that they have been performed under counsel's supervision;~~

1 ~~(2) A declaration as described in paragraph (c)(1) and a request for any~~
2 ~~additional materials to be included in the record and any corrections of~~
3 ~~errors that have come to the attorney's attention. A request for additional~~
4 ~~reporter's transcripts shall state the nature and date of the proceedings and~~
5 ~~the name of the reporter who transcribed them; or~~

6
7 ~~(3) A request for extension of time to file the declaration and requests, in~~
8 ~~accordance with subdivisions (g) and (h).~~

9
10 ~~(Subd (c) amended effective January 1, 1999.)~~
11

12 ~~(d) [Hearings on completion of record] If a request for additional materials or for~~
13 ~~corrections is filed, the clerk shall deliver the original transcript to the judge~~
14 ~~who presided over the trial. A determination on the request shall be made as~~
15 ~~follows:~~

16
17 ~~(1) No later than 15 days after the filing of the declaration and any request~~
18 ~~described in subdivision (c), the trial court shall conduct a hearing~~
19 ~~pursuant to Penal Code section 190.8(e) to address the completeness and~~
20 ~~accuracy of the record. The trial court shall determine whether the~~
21 ~~requested corrections shall be made.~~

22
23 ~~(2) The trial court shall order any additional transcripts or corrections to be~~
24 ~~prepared within 10 days of the date of the order. The clerk shall promptly,~~
25 ~~and in any event within five days, notify the reporter of the court's order.~~
26 ~~If a transcript of any part of the oral proceedings cannot be obtained, the~~
27 ~~court may make an order permitting the preparation of a settled statement~~
28 ~~in accordance with rule 36.~~

29
30 ~~(3) The corrections ordered shall be furnished to the parties in the form of~~
31 ~~copies of corrected transcript pages. The original transcripts shall be~~
32 ~~corrected to reflect all corrections ordered.~~

33
34 ~~(4) The trial court shall set another hearing within five days after the date on~~
35 ~~which the additional or corrected transcripts are filed. At that hearing, the~~
36 ~~court shall determine whether the record has been completed in~~
37 ~~accordance with its previous order and shall order further proceedings for~~
38 ~~correction or completion of the record as needed.~~

39
40 ~~(Subd (d) amended effective May 16, 1997; adopted effective March 1, 1997.)~~
41

42 ~~(e) [Certification] If any counsel fails to file the declaration or request for~~
43 ~~extension of time as required by subdivision (c) of this rule, the court shall not~~

1 certify the record and shall use all reasonable means to ensure compliance with
2 this rule. The court shall set the matter for a hearing, require the attorney to
3 show cause why he or she has not complied with the rule, and, at the hearing,
4 set a date for the attorney to comply. If a declaration is filed without a request
5 for corrections or additions, or when the record has been completed and
6 corrected in accordance with the court's order, the court shall certify the record
7 as complete and shall redeliver the transcripts to the clerk. The record shall be
8 certified as complete within 90 days of the imposition of the death sentence, as
9 required by Penal Code section 190.8(d).

10
11 *(Subd (e) amended effective January 1, 1999.)*
12

13 **(f) — [Preparation of computer-readable copies]** Upon certification of the record
14 as complete, the clerk shall promptly notify the reporter to prepare five
15 computer-readable copies of the transcript, plus an additional computer-
16 readable copy for each additional co-defendant who has been sentenced to
17 death. The computer-readable copies shall conform to the requirements of
18 Code of Civil Procedure section 269(c) and rule 35(b) and shall be labeled to
19 show the date on which they were made. The computer-readable copies shall
20 contain the identical volume divisions, pagination, line numbering, and text of
21 the original paper transcript as corrected and certified as complete. Each
22 transcript of a confidential proceeding shall be placed on a separate disk and
23 clearly labeled as confidential. The reporter shall deliver the computer-
24 readable copies of the transcript no later than 10 days after the date the clerk
25 gives notice of certification.

26
27 *(Subd (f) amended effective January 1, 1999.)*
28

29 **(g) — [Extension of time]** The trial court may extend the time for review of the
30 record and filing the documents required by subdivisions (b) and (c), or any of
31 the time periods specified in subdivision (d), (e), or (f) for good cause. In cases
32 in which the clerk's and reporter's transcripts combined contain more than
33 10,000 pages, the court may grant an additional three days for every 1,000
34 pages of combined transcript for counsel to review the records as required by
35 subdivisions (b) and (c).

36
37 **(h) — [Request for extension of time]** Any request for extension of time for review
38 of the record shall be filed in writing before the expiration of the 30-day
39 deadline.

40
41 **(i) — [Order granting extension of time]** If the court grants any extension of time
42 or extends the time for certification of the record on its own motion, the court

1 shall state the specific reasons that justify the extension in a written order. A
2 copy of the order shall be promptly transmitted to the Supreme Court.

3
4 ~~(j) [Delivery]~~ When the record has been certified as complete, the clerk shall
5 deliver the record and note the dates of the deliveries, as follows:

6
7 ~~(1) One paper copy of the entire record and one computer-readable copy of~~
8 ~~the reporter's transcript to each defendant's appellate attorney and each~~
9 ~~defendant's postconviction attorney. If counsel has not been retained or~~
10 ~~appointed for a defendant, the clerk shall retain appellate and~~
11 ~~postconviction counsel's copies of the record until counsel have been~~
12 ~~retained or appointed; and~~

13
14 ~~(2) One paper copy of the clerk's transcript and one computer-readable copy~~
15 ~~of the reporter's transcript to the Attorney General, the Habeas Corpus~~
16 ~~Resource Center, and the California Appellate Project in San Francisco.~~
17

18 *(Subd (j) amended effective January 1, 1999.)*

19
20 ~~(k) [Notice of delivery]~~ When the record is delivered to defendant's appellate
21 counsel, the clerk of the superior court shall serve notice of delivery upon the
22 Clerk of the Supreme Court.
23

24 *Rule 39.54 amended effective January 1, 1999; adopted effective March 1, 1997.*

25
26 **Drafter's Notes**

27 ~~1999 Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the~~
28 ~~time limit for filing a motion to correct the record in capital cases in which the trial commenced~~
29 ~~before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable~~
30 ~~to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the~~
31 ~~reporter's transcript be delivered to the Attorney General in computer-readable form only; and~~
32 ~~(4) require that copies of the record be provided for postconviction counsel and the Habeas~~
33 ~~Corpus Resource Center.~~

34
35 **~~Rule 39.55. Certification of record for accuracy in death penalty cases~~**
36

1 ~~(a) [General] In death penalty cases in which the trial was commenced on or after~~
2 ~~January 1, 1997, the record shall be certified for accuracy in accordance with~~
3 ~~Penal Code section 190.8(g) and this rule.~~

4
5 ~~(b) [Request for corrections and additions by appellate counsel] Appellate~~
6 ~~counsel shall file any request for corrections or additional transcripts no later~~
7 ~~than 90 days after the delivery of the record on appeal to the defendant's~~
8 ~~appellate counsel. Any request for additional reporter's transcripts shall state~~
9 ~~the nature and date of the proceedings and the name of the reporter.~~

10
11 ~~(c) [Hearing on request] If a request is filed, the clerk shall deliver the original~~
12 ~~transcript to the trial judge. No later than 15 days after the filing of any request~~
13 ~~described in subdivision (b), the trial court shall conduct a hearing pursuant to~~
14 ~~Penal Code section 190.8(e) to address the completeness and accuracy of the~~
15 ~~record, in accordance with the procedures and timelines set out in rule~~
16 ~~39.54(d).~~

17
18 ~~(d) [Certification] If no request for corrections or for additional transcripts is~~
19 ~~made, or when the record has been completed and corrected in accordance with~~
20 ~~the court's order, the court shall certify the record as accurate and shall~~
21 ~~redeliver the record to the clerk. The record shall be certified as accurate~~
22 ~~within 120 days after it has been delivered to appellate counsel, as required by~~
23 ~~Penal Code section 190.8(g).~~

24
25 ~~(e) [Preparation of computer-readable copies] Upon certification of the record~~
26 ~~as accurate, the clerk shall promptly notify the reporter to prepare six corrected~~
27 ~~computer-readable copies of the transcript, plus an additional computer-~~
28 ~~readable copy for each additional co-defendant who has been sentenced to~~
29 ~~death. The computer-readable copies shall conform to the requirements of~~
30 ~~Code of Civil Procedure section 269(c) and rule 35(b) and shall be labeled to~~
31 ~~show the date on which they were made. The computer-readable copies shall~~
32 ~~contain the identical volume divisions, pagination, line numbering, and text of~~
33 ~~the original paper transcript as corrected and certified as accurate. Each~~
34 ~~transcript of a confidential proceeding shall be placed on a separate disk and~~
35 ~~clearly labeled as confidential. The reporter shall deliver the computer-~~
36 ~~readable copies of the transcript within 10 days after the date the clerk gives~~
37 ~~notice of certification.~~

38
39 ~~(Subd (e) amended effective January 1, 1999; previously amended effective May 16, 1997;~~
40 ~~adopted effective March 1, 1997.)~~
41

1 (f) ~~[Extension of time]~~ The trial court may extend the time for filing a request for
2 corrections or additions under subdivision (b) and any of the time periods
3 specified in subdivision (c), (d), or (e) for good cause.
4

5 (g) ~~[Request for extension of time to request corrections]~~ Any request for
6 extension of time to request correction of the record or additional records must
7 be filed in writing before the expiration of the 90-day deadline. In cases in
8 which the clerk's and reporter's transcripts combined contain more than 10,000
9 pages, the court may grant an additional 15 days for every 1,000 pages of
10 combined transcript over 10,000 pages for counsel to file a request for
11 corrections or additional transcripts.
12

13 (h) ~~[Order extending time]~~ If the court grants any extension of time or extends
14 the time for certification of the record on its own motion, the court shall state
15 the specific reasons that justify the extension in a written order. A copy of the
16 order shall be promptly transmitted to the Supreme Court. In any case in which
17 the trial court has granted an extension of time, it may conduct a status
18 conference or require a written status report 90 days after the delivery of the
19 record to defendant's appellate attorney, or at some other reasonable time, so
20 that the attorney may report on the progress made in reviewing the record.
21

22 *Rule 39.55 amended effective January 1, 1999; adopted effective March 1, 1997.*

23 **Drafter's Notes**

24 ~~1999~~ Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the
25 time limit for filing a motion to correct the record in capital cases in which the trial commenced
26 before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable
27 to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the
28 reporter's transcript be delivered to the Attorney General in computer-readable form only; and
29 (4) require that copies of the record be provided for postconviction counsel and the Habeas
30 Corpus Resource Center.

33 **Rule 39.56. Transmission of record in death penalty cases**

35 ~~When the record has been certified as accurate in accordance with rule 39.55(d), the~~
36 ~~clerk shall transmit the record as follows:~~

- 38 (1) ~~To the Clerk of the Supreme Court, the original record and one computer-~~
39 ~~readable copy of the reporter's transcript;~~
40

- (2) ~~To the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project, (i) a notice enumerating all corrections ordered and stating a date of certification, (ii) copies of any corrected pages of the clerk's transcript, and (iii) a corrected computer readable copy of the reporter's transcript;~~
- (3) ~~To the defendant's appellate counsel and postconviction counsel, (i) a notice enumerating all corrections ordered and stating a date of certification, (ii) copies of any corrected pages of the clerk's and reporter's transcripts, and (iii) a corrected computer readable copy of the reporter's transcript; and~~
- (4) ~~To the Governor, the copies of the record required by Penal Code section 1218, with copies of pages containing corrections inserted, and with a copy of the notice of corrections.~~

Rule 39.56 amended effective January 1, 1999; adopted effective March 1, 1997.

Drafter's Notes

~~1999-Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.~~

Rule 39.57. Time for filing briefs in death penalty cases

- (a) ~~[Application] This rule applies to death penalty cases in which the trial commenced on or after January 1, 1997.~~

~~(Subd (a) amended effective July 1, 2000.)~~

- (b) ~~[Appellant's opening brief] Once the record is certified for completeness or the clerk delivers the completed record to appellate counsel, whichever is later, the Clerk of the Supreme Court shall notify appellant's counsel and the Attorney General of the due date for the appellant's opening brief. If the clerk's and reporter's transcripts combined contain 10,000 pages or fewer, appellant's opening brief shall be filed no later than 210 days after the certification of the~~

1 record for completeness or after appellant's counsel receives a copy of the
2 completed record, whichever is later, as mandated by Penal Code section
3 190.6(b). If the clerk's and reporter's transcripts combined contain more than
4 10,000 pages, the time for filing appellant's opening brief shall be
5 automatically extended by 15 days for each 1,000 pages of combined transcript
6 over 10,000 pages.
7

8 (c) ~~[Respondent's brief]~~ Upon the filing of the appellant's opening brief, the
9 Clerk of the Supreme Court shall notify the Attorney General of the due date
10 for respondent's brief. If the clerk's and reporter's transcripts combined contain
11 10,000 pages or fewer, respondent's brief shall be filed no later than 120 days
12 after the date that appellant's opening brief was filed. If the clerk's and
13 reporter's transcripts combined contain more than 10,000 pages, the time for
14 filing respondent's brief shall be automatically extended by 15 days for each
15 1,000 pages of combined transcript over 10,000 pages.
16

17 (d) ~~[Appellant's reply brief]~~ Appellant may file a reply brief no later than 60 days
18 after the date that respondent's brief was filed.
19

20 (e) ~~[Extension of time]~~ Extension of time to file a brief may be granted by the
21 Supreme Court for good cause, in accordance with the policies and factors
22 contained in rule 45.5, to the extent they are applicable.
23

24 *Rule 39.57 amended effective July 1, 2000; adopted effective March 1, 1997.*
25

26 **Drafter's Notes**

27 **July 2000** ~~Rule 39.57 was amended to apply to all capital cases in which trial commenced on or~~
28 ~~after January 1, 1997.~~